Filed 9/10/19 P. v. Hernandez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OLIVIA HILDA HERNANDEZ, Defendant and Appellant.	E070394 (Super.Ct.No. SWF1707689) OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge. Affirmed in part; reversed in part and remanded with directions.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

A. PROCEDURAL HISTORY

On November 7, 2017, an information charged defendant and appellant Olivia Hilda Hernandez with one count of grand theft for taking $1,013.29 in merchandise from a Target store under Penal Code[1] section 487, subdivision (a) (count 1). The information also alleged that defendant suffered one prior strike conviction within the meaning of sections 1170.12 and 667, subdivisions (b) through (i), and one prison prior conviction within the meaning of section 667.5, subdivision (b), in case No. SWF1401384.

On January 9, 2018, a jury found defendant guilty of theft, and that she "stole property in the amount more than $950." The next day, the trial court found defendant's prior conviction to be true.

On February 23, 2018, the trial court granted defendant's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, and sentenced defendant to two years in state prison. The court then awarded defendant credit for 141 actual days of custody, and 140 days of conduct credit, for a total of 281 days presentence custody credit.

On April 24, 2018, defendant filed a timely notice of appeal.[2]

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] On January 7, 2019, the People filed a request for judicial notice. On January 28, 2019, we reserved for consideration with the appeal on the request for judicial notice. We hereby grant the People's request for judicial notice.

B. FACTUAL HISTORY

On October 6, 2017, defendant entered a Target store with a laptop bag and a black purse. Target loss prevention employee, Eskandar Haidari, was working undercover in the store. Haidari noticed defendant because she had a big purse, was selecting merchandise quickly, and was moving through the aisles at a fast pace. Defendant was in the store for about two hours and selected numerous items from various sections of the store. Haidari watched defendant for approximately 30 minutes, then watched her on the store's video surveillance.

Defendant went to the sporting goods section and, among other things, selected a black and neon green duffel bag, bug spray lotions, and other sporting good items. She also proceeded to take wine, various food items, four women's clutches and other purses, underwear, and multiple cosmetic items. Haidari did not see defendant take two of the swimsuits that ended up in her shopping cart. Haidari admitted that defendant could have been in the swimsuit section before he started to follow her. Haidari noted that the swimsuits had Target price tags on them.

After putting all the items in her cart, defendant went to a fitting room with her black purse and the cosmetic items. When she came out of the fitting room, defendant only had her black purse. Haidari searched the fitting room after defendant left the area and did not find any of the cosmetic items or wrappers. Defendant was also caught on video surveillance putting the items into the green and black duffel bag that she had selected.

Eventually, defendant headed toward the store exit and stopped at the self-checkout in an attempt to purchase some food items. Defendant bagged the items, told the Target associate that she had forgotten her wallet, and then started pushing the cart with the unpaid merchandise toward the exit. When defendant passed through the security towers, Haidari approached her, asked her to come back inside, and escorted her to the loss prevention office.

Defendant admitted to stealing the items in her cart, for her own use or to sell, and signed an admission statement. Defendant initially provided a false name. Defendant also signed an admission statement form before any items or amounts were filled in.

Haidari recovered over 90 items from defendant. Using Target's case management system, he catalogued the recovered merchandise by scanning or manually entering the barcode for each item. Haidari explained that he put all the merchandise in the cart, took one item out for scanning at a time, and then put each item in a pile of already-scanned items to avoid double scanning. He also explained that the system required action after every scanned item to ensure against multiple scannings.

Haidari testified that if multiples of the same items showed up on the inventory list, it was because more than one of the same items were in defendant's shopping cart. He specifically testified that the multiple purses on the inventory list were correct because, when he shadowed defendant in the store, he saw her take more than one of some purses. Haidari denied scanning any of the same items twice.

Haidari's assistant, Mario Barragan, testified that he handed an item to Haidari, who then scanned the item and placed it in a separate pile. Barragan did not see Haidari double scan any of the items. If Barragan had seen that, he would have said something because his name was also on the report.

After all the items were scanned, Target's system calculated the total amount of stolen items to be $1,013.29, not including sales tax. The tax was $78.38.

Barragan put the merchandise back into the same bags that defendant had used to conceal the items and took everything to guest services so that he could photograph them because there was not enough room in the loss prevention office. Even in the larger guest services area, there were so many items that some were stacked on the floor and other items were stacked on top of each other. Barragan tried to make all the items visible.

In addition to Haidari and Barragan, Lauren Rodriguez-Dunbar testified. Dunbar was the executive team leader of asset protection, which oversaw the security department at Target. On the day defendant was apprehended, Dunbar testified that she assisted in detaining defendant and watched via video camera. She also testified as to the "procedure and practices set in place to make sure that the items that are recovered in these high-volume cases are not double-scanned." She stated, "So, we will have one pile of items that have not been been scanned. One person will scan. And I will take the item and I will put it in a separate pile to ensure that it does not get scanned twice."

DISCUSSION

A. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE VALUE OF THE STOLEN ITEMS EXCEEDED $950

Defendant contends that there is insufficient evidence to support a finding that she stole over $950 in merchandise from Target. Specifically, defendant contends that the Target employee incorrectly scanned three items twice. We disagree.

1. *STANDARD OF REVIEW*

A trial court's resolution of a question of fact is reviewed under the substantial evidence test. (*People v. Mickey* (1991) 54 Cal.3d 612, 649.) The primary reason for deferring to the trial court's factfinding ability is that the resolution of conflicting evidence will necessarily depend upon the relative credibility of the witnesses offering that evidence. The trier of fact is the sole judge of that credibility (*Estate of Teel* (1944) 25 Cal.2d 520, 526), because only the trier of fact has the opportunity to observe and hear the witnesses. By contrast, an appellate court has nothing but the cold written record of the words spoken, which "cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243, overruled on another ground in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287, fn.3.)

2. *THE JURY'S FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE*

In this case, there is substantial evidence to support the jury's finding that defendant stole over $950 in merchandise from Target.

First, both Haidari and Barragan testified about how they scanned the items stolen by defendant into Target's inventory system. These loss prevention employees testified that the stolen items were placed in one pile, scanned, and then placed in a second, separate pile. Additionally, their supervisor, Dunbar, testified that this is the normal practice and procedure used by Target employees to avoid double scanning items.

Second, Haidari testified that he did not mistakenly or intentionally scan any item twice. Barragan watched Haidari as Haidari scanned the stolen merchandise; Barragan testified he did not see Haidari scan any item twice. Haidari further testified that any item included twice on the inventory list was accurate because multiples of some of the same items were stolen.

Third, the items were scanned in the order they appeared on the inventory list with no consecutive identical items, showing that no items were accidentally scanned twice in a row.

Fourth, Haidari testified that pursuant to Target policy, he watches customers "for what they come in with or if they select multiple of the same merchandise, or if they go towards each aisle in a fast pace. And that's what [defendant] was doing." He also testified that there were two green weekender bags and two cognac-striped clutch purses included in the stolen items. While Haidari could not remember scanning two floral

bags, after reviewing the inventory list he confirmed that his report was accurate and that there were two floral bags.

Fifth, the inventory list reflected that the total amount of the stolen items was $1,013,29 prior to the sales tax being included.

Notwithstanding the evidence presented to the jury, defendant claims that the jury was given only two pieces of direct evidence—the inventory list and the picture of the merchandise—and that those items contradicted each other. Specifically, defendant contends that three of the purses were double-scanned because two of those purses cannot be located in the picture of the merchandise taken by Barragan after scanning was complete. This is an argument defendant could have made to the jury during trial. On appeal, we "presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Where "circumstances reasonably justify the trier of fact's findings, reversal of the judgement is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Ibid.*) Indeed, "[a] reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the . . . verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *Lindberg*, at p. 27 [reversal unwarranted "simply because the circumstances might also reasonably be reconciled with

a contrary finding"].) Moreover, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; Evid. Code, § 411.)

In this case, the jury believed the witnesses' testimony regarding the items they scanned and the inventory list that was presented to them. As a reviewing court, we cannot reverse this case for insufficient evidence because there is evidence—the testimony given by Dunbar, Haidari and Barragan, and the inventory list—to support the jury's finding that the value of the stolen items exceeded $950. Because we find that there is sufficient evidence to support the jury's finding that defendant stole over $950 in merchandise, we need not consider whether sales tax should be included in the total amount. (*People v. Seals* (2017) 14 Cal.App.5th 1210, 1215 [sales tax necessary because there was no evidence that the stolen property exceeded $950 without sales tax].)

B. THE CASE SHOULD BE REMANDED UNDER SECTION 1001.36

Defendant contends that "the case must be remanded so the trial court can exercise its newly-established discretion pursuant to Penal Code section 1001.36." (All caps. & boldface omitted.) We agree with defendant.

1. *LEGAL BACKGROUND*

On January 27, 2018, while this case was on appeal, sections 1001.35 and 1001.36 became effective. Sections 1001.35 and 1001.36 authorize pretrial diversion for defendants with mental disorders. " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment" (§ 1001.36, subd. (c).) A court may grant pretrial

diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

2. *SECTION 1001.36 IS RETROACTIVE*

As a canon of statutory interpretation, we generally presume laws apply prospectively. (*People v. Superior Court* (*Lara*) (2018 4 Cal.5th 299, 307 (*Lara*).) However, the Legislature may explicitly or implicitly enact laws that apply retroactively. To determine whether a law applies retroactively, we must determine the Legislature's intent. (*Ibid.*)

" 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an

inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' " (*Lara, supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745.) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*Lara*, at p. 308.)

The *Estrada* rule applies to section 1001.36 because it lessens punishment by giving a defendant the possibility of diversion and then dismissal of criminal charges. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220.) In addition, applying section 1001.36 retroactively is consistent with the statute's purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

The statute's definition of pretrial diversion, which indicates the statute applies at any point in a prosecution from accusation to adjudication (§ 1001.36, subd. (c)), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a

juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara* . . . , from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Furthermore, we note that the California Supreme Court decided *Lara* before the Legislature enacted section 1001.36 and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended for the courts to treat section 1001.36 in a different manner, we would expect the Legislature to have expressed this intent clearly and directly, not obscurely and indirectly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) Consequently, we conclude section 1001.36 applies retroactively to this case.

The People, however, contend that by using the term "adjudication," the Legislature "made it clear that *pretrial* mental health diversion is only available from the time a defendant is charged with a crime to the time the defendant's case is resolved by a trier of fact." We disagree. As noted above, and as acknowledged by the People, "the *Frahs* court agreed that the defendant's case had been 'adjudicated' at the time the new law was enacted, but nonetheless concluded that the law applied retroactively to all cases not final on appeal." The People argue that "*Frahs* was incorrectly decided." (Boldface omitted.) We disagree with the People and follow the holding in *Frahs*, and find that section 1001.36 applies to this case because the case is not yet final on appeal.

On May 23, 2019, subsequent to the filing of the briefs in this case, the fifth appellate district in *People v. Craine* (2019) 35 Cal.App.5th 744, 760, held that "section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing." On August 2, 2019, however, the sixth appellate district in *People v. Weaver* (2019) 36 Cal.App.5th 1103, disagreed with *Craine*. As will be explained *post*, we agree with the analysis in *Weaver* and find that section 1001.3 applies retroactively in this case.

In *Weaver*, *supra*, 36 Cal.App.5th 1103, the court recognized "that application of section 1001.36 to individuals who have already been convicted but whose convictions are not yet final on appeal may appear to conflict with several aspects of the provision's text. In particular, the statute's definition of 'pretrial diversion' states that diversion is available only 'until adjudication.' (§ 1001.36, subd. (c).)" (*Id.* at p. 1120.) The court noted that the *Craine* court "observed, 'adjudication' is a 'shorthand for the adjudication of guilt or acquittal' (*Craine, supra*, 35 Cal.App.5th at p. 755 . . .) and '[a]t most . . . could be synonymous with the rendition or pronouncement of judgment, which occurs at the time of sentencing.' (*Ibid.*) When a case is remanded to the trial court for potential diversion after the defendant has been sentenced, the term " 'until adjudication' " is rendered surplusage. (*Ibid.*)" (*Weaver,* at p. 1120.) The *Weaver* court also went on to explain that in *Craine,* the "court explained, 'pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of "adjudication," the "prosecution" is over and there is nothing left to postpone. (§ 1001.36, subd. (c).)' (*Id.* at p. 756. . . .)" (*Weaver*, at p. 1120.)

The *Weaver* court went on to note that "the statute requires that the defendant consent to diversion and 'waive[] his or her right to a speedy trial. . . .' (§ 1001.36, subd. (b)(1)(D).) A defendant who has been tried and sentenced no longer has a speedy trial right to waive. (See *Betterman v. Montana* (2016) ___ U.S. ___ . . . ; *People v. Domenzin* (1984) 161 Cal.App.3d 619, 622. . . .) Furthermore, as the court in *Craine* observed, the provision addressing the dismissal of charges and the limits on access to records after satisfactory completion of diversion (namely subdivision (e)) uses 'preadjudicative language to describe these benefits.' (*Craine, supra,* 35 Cal.App.5th at p. 757. . . .)" (*Weaver, supra,* 36 Cal.App.5th at p. 1120.)

The *Weaver* court, however, stated, "contrary to the reading of this language by the court in *Craine,* we view these portions of the statute as demonstrating the Legislature's intent that individuals who commit their crimes after the effective date of section 1001.36 and whose guilt has been adjudicated in the form of a plea of guilty or no contest or a conviction after trial are no longer eligible for pretrial diversion under the statute. But for individuals like [the defendant], whose convictions are not yet final on appeal but were never given an opportunity for diversion because they were convicted prior to the statute's effective date, we see nothing in the text of section 1001.36 sufficient to overcome the *Estrada* presumption. For example, the Legislature did not include in section 1001.36 an 'express savings clause' mandating prospective application. In addition, we conclude that the statute's creation of a pretrial mental health diversion scheme does not ' " 'clearly signal[]' " ' the Legislature's intent to bar retroactive application. (*Lara, supra*, 6 Cal.5th at p. 1135. . . .)" (*Weaver, supra,* 5 Cal.App.5th at

pp. 1120-1121.) We agree with the reasoning set forth in *Frahs* and *Weaver* and reject the People's position.

Additionally, the People contend that "even if amended section 1001.36 were retroactive, [defendant] has not demonstrated prima facie eligibility for relief." (Boldface omitted.) Again, we disagree. First, the prima facie showing provision is discretionary, not mandatory. Second, the purpose of the provision is to determine whether a defendant is potentially eligible for diversion. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 2 [the prima facie showing provision "[a]uthorizes a court to request a prima facie hearing where a defendant must show they are potentially eligible for diversion"].)

Moreover, defendant has made a showing of potential eligibility to warrant a conditional reversal. (*People v. Aguayo* (2019) 31 Cal.App.5th 758 ["We . . . conclude [the defendant] has made a showing of potential eligibility sufficient to warrant a remand for further proceedings].) In this case, the trial court expressed concern about defendant's mental state, the court and defense counsel agreed that defendant had "some mental problems," and, at one point, the trial court believed that defendant had already been evaluated for competency. Defense counsel noted that defendant was a law-abiding citizen from 1990 to 2014; she was gainfully employed through most of 1997 through 2012; and she had started a family. However, after her husband of 30 years and her mother passed away, coupled with what counsel believed was the onset of defendant's unaddressed mental health issues, she was sent into "a tail spin," which defendant

described as a "major breakdown." Instead of seeking mental health treatment because of the stigma attached to receiving such care, defendant self-medicated on the streets. Defense counsel also believed that defendant failed to receive assistance for her mental health from the parole department after serving her prison time for her strike case.

Furthermore, defendant told the probation officer that she believed she would benefit from mental health counseling and treatment. While in custody pending trial, defendant was diagnosed with bipolar disorder, and attention deficit hyperactivity disorder. And, for the first time, defendant received counseling for her mental health. She was also given medication to help with her mental health issues. Defendant believed that her mental health issues began when her son was shot in the chest. Her son survived, but defendant believed this incident triggered a major breakdown and difficulty breathing, resulting in numerous emergency room visits. Defendant believed that her mental health further deteriorated after losing the "pillars" of her life—her husband of 30 years, her brother, and her mother—between 2010 and 2011.

Because the record shows that defendant suffers from a mental health disorder that possibly led to her criminal activity, she meets the threshold requirements for consideration for pretrial diversion. Whether the court will be satisfied that defendant's mental disorder was a significant factor in committing the crime, whether a qualified mental health expert will believe defendant's symptoms will respond to treatment, and whether the court will be satisfied that treating defendant out in the community will not pose an unreasonable risk of danger to public safety, are questions not answered nor capable of being answered at this juncture. Defendant has not had an opportunity to

develop the requisite expert evidence and the trial court has not had an opportunity to consider whether she would be an appropriate candidate for mental health diversion. By remanding the matter, which we conclude is the most appropriate course, both defendant and the court will have these opportunities.

DISPOSITION

The jury's finding that the value of the items stolen by defendant exceeded $950 is supported by substantial evidence. The judgment, however, is reversed. The cause is remanded to the superior court with directions to conduct a mental health diversion eligibility hearing under section 1001.36. If the court determines defendant qualifies for diversion, then the court may grant diversion. If defendant successfully completes diversion, then the court shall dismiss the charges. If the court determines defendant is ineligible for diversion, or defendant does not successfully complete diversion, then the court shall reinstate defendant's conviction, conduct further sentencing proceedings as appropriate, and forward a certified copy of the resulting abstract of judgment to the appropriate corrections agency.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.